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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DARNELL CARTER,

Defendant and Appellant.

B144880

(Los Angeles County
Super. Ct. No. YA042831)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura C. Ellison, Judge. Affirmed in part and reversed in part.

Joseph B. de Illy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and David C. Cook, Deputy Attorney General, for Plaintiff and Respondent.

Larry Carter appeals from the judgment entered following a jury trial in which he was convicted of robbery and petty theft with a prior theft-related conviction. (Pen. Code, §§ 211, 666 [further section references are to the Pen. Code].) In a bifurcated bench trial, defendant was found to have suffered a prior felony conviction for which he had served a prison term (§ 667.5, subd. (a)) and a qualifying prior felony conviction under the three strikes law (§§ 667, subds. (b)–(i), 1170.12). We reverse the conviction of petty theft and otherwise affirm the judgment.

BACKGROUND

In the afternoon of December 29, 1999, loss prevention agents at the Albertson's market in Torrance saw defendant put several cameras in his shopping cart and then put them inside his shirt (defendant was also wearing a jacket). Defendant next placed four packages of meat in his shopping cart and then in his shirt. Defendant left the store without paying for the cameras and meat. The loss prevention agents followed.

One agent approached defendant a few feet from the front door and identified himself. Defendant struggled with the agent, pushing him against a van that was parked nearby. The agents restrained defendant and brought him back inside the market. They recovered the stolen cameras and meat, as well as two packages of candy defendant had taken without payment.

Defendant did not present any evidence. He argued to the jury that the prosecution witnesses were not credible because there were inconsistencies in their testimony and that it would have been impossible for him to have carried so many items under his shirt.

ISSUES

Defendant contends that the trial court prejudicially erred in (1) permitting his stipulation to having suffered a prior theft-related conviction to be read to the jury and (2) instructing the jury pursuant to CALJIC No. 17.41.1. He further contends that (3) he was improperly convicted of both robbery and theft.

DISCUSSION

1. Stipulation to Prior Conviction

Before the start of trial, the prosecutor brought up the question of whether defendant would be admitting that he had suffered a prior conviction for purpose of the petty theft charge. The trial court explained to defendant, who was appearing in propria persona, that if he did not stipulate to at least one theft-related prior conviction (several had been alleged), the prosecution would be able to present evidence of the prior convictions to the jury. Defendant stated that he would stipulate to one prior conviction, and the prosecutor agreed. The court then asked the prosecutor to prepare a written stipulation “and read it to the jury after [defendant] sees it and agrees to it.” The prosecutor did so, and the stipulation, which stated that defendant had been convicted of burglary in 1999 for which he had been sentenced to state prison, was ultimately read to the jury. The prosecutor also made reference to the stipulation during closing argument. At sentencing, defendant argued that informing the jury of the stipulation violated section 1025. Defendant’s objection was noted and overruled.

Section 1025, subdivision (e), provides that “[i]f the defendant pleads not guilty, and answers that he or she has suffered the prior conviction, the charge of the prior conviction shall neither be read to the jury nor alluded to during trial. . . .” Section 1025 applies to a prior conviction alleged as the predicate to a charged theft under section 666. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480.) Accordingly, the “allu[sion]” during the instant trial to defendant’s prior conviction was error.

The Attorney General asserts that defendant waived the error by failing to make a timely objection. We find no basis for requiring a defendant who willingly “answer[ed]” under section 1025 that he had suffered the prior conviction to object to the prosecutor’s failure to comply with *Bouzas*, especially when the prosecutor read the stipulation to the jury at the specific direction of the trial court.

Nonetheless, we find no prejudice. Defendant argues that this was a close case because the jury deliberated for approximately six hours over a two-day period. But, the majority of that six hours was taken up with a readback of testimony and a hearing

regarding a juror who was overheard by the prosecutor discussing the facts of the case on her cell phone during a lunch break. The juror was removed for misconduct, thus requiring that the deliberations begin anew. More important, our review of the record reveals that the evidence against defendant was overwhelming and his defense was essentially nonexistent. Accordingly, it is not reasonably probable that defendant would have secured a more favorable outcome in the absence of the *Bouzas* error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Wade* (1996) 48 Cal.App.4th 460, 469–470.)

2. CALJIC No. 17.41.1

CALJIC No. 17.41.1, with which the jury was instructed, provides: “The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.” Defendant contends that the instruction constituted reversible error because it deprived him of his right to a jury trial in various respects.

As recently noted by the Supreme Court in *People v. Williams* (2001) 25 Cal.4th 441, 446, footnote 3, the validity of CALJIC No. 17.41.1 is pending before that court in several cases, including *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 4, 2000, S086462. Nonetheless, under the circumstances of this case, we need not speculate as to whether the instruction had the effect claimed by defendant. The instant record reveals that there was no jury deadlock, there were no holdout jurors, and there was no evidence that any juror refused to follow the law.¹ In other words, there was no indication that the use of CALJIC No. 17.41.1 affected the

¹ Although one juror was removed during deliberations, it was the prosecutor, not the other jurors, who overheard the one juror discussing the case.

verdict in any way. Accordingly, even if CALJIC No. 17.41.1 is ultimately found to be improper, reversal would not be required regardless of the standard of prejudice employed. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1334–1336.)

3. Convictions of Robbery and Petty Theft

Defendant contends, and the Attorney General aptly concedes, that it was improper to convict him of both robbery and petty theft of the same property and that we should therefore reverse defendant's conviction of petty theft (count 2), which is the lesser of the two crimes. (*People v. Ortega* (1998) 19 Cal.4th 686, 699; *People v. Pearson* (1986) 42 Cal.3d 351, 355.) We shall do so. We further observe that inasmuch as imposition of sentence for petty theft was stayed pursuant to section 654, the reversal will have no impact on defendant's prison term.

DISPOSITION

With respect to count 2 (violation of Penal Code section 666), the judgment is reversed. In all other respects, the judgment is affirmed

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MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.